VIA E-MAIL ONLY

U.S. Environmental Protection Agency

Apple Chapman (chapman.apple@epa.gov)

Tim Sullivan (sullivan.tim@epa.gov)

Christopher Williams (williams.christopher@epa.gov)

Re: Comments on EPA's Draft Oil and Natural Gas Exploration and Production Facilities New

Owner Audit Program Agreement

Chartered in 1915, WVONGA is one of the oldest trade organizations in the State, and the only

association that serves the entire oil and gas industry. The activities of our members include construction,

environmental services, drilling, completion, production, gathering, transporting, distribution and

processing. WVONGA members operate in almost every county in West Virginia and employ thousands of

people across the State, with payrolls totaling hundreds of millions of dollars annually. Our members have

cumulative investment of nearly ten billion dollars in West Virginia, account for 80% of the production

and 90% of the permits, operate more than 20,000 miles of pipeline across the state and provide oil and

natural gas to more than 300,000 West Virginia homes and businesses. As such, WVONGA's members

have a keen interest in all aspects of environmental regulation associated with oil and gas activities,

including EPA's draft oil and natural gas exploration and production facilities new Owner Audit Program

Agreement.

EPA's voluntary audit programs have proved valuable to the regulated community, but the

proposed revisions to the new owner audit program to the oil and gas industry (the "Draft Agreement")

should be modified and tailored to incentivize broader and routine use. Even prior to this draft

proposal, self-audits could involve hundreds of newly-acquired production facilities spread throughout a

vast geographic area; in some cases, acquisitions come with sparse recordkeeping that makes it difficult

to determine compliance. This, along with the unique contractual arrangements associated with these

transactions, can present unique challenges to conduct the self-audit in conformance with the various

requirements and timelines within the Draft Agreement. WVONGA appreciates EPA's outreach to

interested stakeholders in developing this Draft Agreement, and we provide our comments below.

I. Operators should not be required to conduct an "engineering and design analysis" on newlyacquired

storage tank Vapor Control System's

EPA's Draft Agreement appears to make the assessment of a storage tank battery vapor control

system's ("VCS") engineering and design a mandatory condition or requirement of the Draft Agreement.

Paragraph 5 of the Draft Agreement states: "At a minimum, [COMPANY] shall comply with Appendix B's

requirements." Appendix B of the Draft Agreement then identifies the specific methodology an

operator must follow to conduct a VCS engineering and design analysis. Acknowledging that use of this

agreement is entirely voluntary, WVONGA believes this current approach would create a significant

disincentive for operators to utilize the Draft Agreement, perhaps rendering it unusable.

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An engineering and design analysis for existing or new VCS, as contemplated in Appendix B, is

not an express regulatory requirement in many oil and gas jurisdictions throughout the country,

including West Virginia. EPA is essentially requiring operators that wish to avail themselves of the Draft

Agreement to take corrective action (i.e., an engineering and design analysis) for a non-existent

violation. Of greater concern, it appears EPA is asserting that the requirements in Appendix B constitute

a national engineering and design standard for a VCS. Those requirements, however, are not found in

any federal or state regulation, but have instead been extracted, nearly word-for-word, from

individually-negotiated settlement agreements from EPA Region 8 and Colorado. Those settlement

agreements do not qualify as legal precedent, have no legal effect beyond that particular agreement,

and are based primarily on alleged violations of Colorado air quality regulations.

At the federal level, 40 C.F.R. Part 60, Subpart OOOOa ("Quad Oa") is the only regulation that

arguably requires some form of an "assessment" of the "closed vent system" for a storage vessel, which

must be certified by a qualified professional engineer.1 Quad Oa, however, does not indicate that this

"assessment" must be conducted in accordance with the prescriptive methodology found in Appendix

B.2 Importantly, WVONGA is aware that newly-available methodologies for assessing VCSs (and

addressing excess emissions) exist, and have been vetted; use of the new technologies, which do not

rely on the approach outlined in the Appendix B in any fashion, would not be available to an operator

wishing to use the Draft Agreement.

In addition, in most cases it would not be possible for an operator to comply with the Draft

Agreement's requirement to provide a specific statutory or regulatory citation that supports a potential

engineering and design violation. The Draft Agreement requires an operator to submit a Final Report

that specifically identifies a "Violation" and the underlying statutory and regulatory citation for that

"Violation".3 The Draft Agreement goes on to define "Violation" as "noncompliance with an applicable

requirement under the Clean Air Act, its implementing regulations, and federally-approved and -

enforceable requirements of applicable State Implementation Plans (SIPs), including federal and state

permits and permitting requirements."4 As stated above, in many, or most, jurisdictions, there is no

federal or state regulatory requirement that could even be cited that requires a VCS engineering and

design analysis, at least along the lines described in Appendix B. While the Draft Agreement itself is a

good step in the right direction, it should not specify a certain, prescribed methodology. Appendix B

should be eliminated entirely, and all references to a discrete methodology in the Draft Agreement

should be removed.

1 WVONGA recognizes that in Colorado the state environmental agency now interprets its existing air quality regulations to

require some form of a VCS engineering and design analysis. See Colorado Air Pollution Control Division, Storage Tank and

Vapor Control Systems Guidelines - Design, Operation and Maintenance, May 4, 2018, available at:

https://www.colorado.gov/cdphe/air-oilandgas-storagetankguidelines. But those regulations do not specify the required

methodology; rather, the agency has developed voluntary Storage Tank and Vapor Control Systems Guidelines ("VCS

Guidelines") that an operator may choose to follow. The VCS Guidelines specifically state that they "are not intended to

prescribe requirements and presume that owners and operators can tailor these approaches to their specific facilities to

demonstrate compliance with applicable Colorado air quality statutes and regulations[.]" Note that WVONGA does not

take a position on whether the Division's interpretation of Regulation No. 7, § XII.C.1.b., or any other regulation, is valid.

2 40 C.F.R. § 60.5411a(d)(1).

3 Draft Agreement, App. C,¶ 3.A.vi-ix.

4 Draft Agreement, App. A, ¶ 19.

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II. If an Operator Chooses to Assess VCS Engineering and Design, the Corrective Action Should

Not be Dictated Via EPA Audit Policy, but Should be Based Upon Applicable State

Requirements and Narrowly Tailored to Address the Particular Violation

In jurisdictions where a VCS engineering and design analysis is required, a new owner of oil and

gas assets may choose to address those issues in a self-audit, and it may make sense to enter into the

Draft Agreement with EPA. But even in those cases, the VCS engineering and design requirements in

that particular jurisdiction may be much different than those identified in Appendix B. Historically, the

purpose of EPA's audit policies has been to incentivize identification and correction of noncompliance

issues, not to dictate how to correct noncompliance. Presumably, if a particular jurisdiction requires an

engineering and design evaluation via regulation, it will also have some regulatory requirement or

guidance as to how to conduct the required engineering and design evaluation. And as noted, new

technological developments may result in changes to how a VCS engineering and design analysis is

conducted, or whether one is even required, as noted above. Accordingly, the Draft Agreement should

be silent as to the particular methodology required to correct the violation.

Finally, it is unclear whether the Draft Agreement requires a new owner to conduct an

engineering and design evaluation under Appendix B for all acquired storage tanks, regardless of

whether those storage tanks were already subject to an engineering and design analysis by the previous

owner. We do not believe it should. The Draft Agreement should only be used to disclose and correct

"violations," and the "violation," in our view would be the failure to conduct an engineering and design

analysis where one is specifically required. Furthermore, to the extent EPA is suggesting that the failure

to conduct an engineering and design analysis in exact compliance with the Appendix B requirements is

a "violation," we believe that is incorrect. As noted above, we are not aware of any jurisdiction that, by

regulation, specifically requires a VCS engineering and design analysis along the lines identified in

Appendix B. Indeed, the closed vent system "assessment" requirement in Quad Oa provides

the

operator with flexibility as to what the necessary "assessment" entails and contains no reference to the

many terms included in Appendix B (e.g., Potential Peak Instantaneous Vapor Flow Rate and

Compromised Equipment).

III. The Results of the Audit Should not be Used to Initiate an Enforcement Action Against the

Prior Owner or Operator

In upstream oil and gas transactions, it is standard for the buyer to assume all preclosing/

historical environmental liabilities associated with the acquired assets. This has proved to be an

obstacle to new owners disclosing the results of a voluntary self-audit to EPA because such disclosure

may cause EPA to bring an enforcement action against the prior owner, and any civil penalties that may

result from that enforcement action against the prior owner would ultimately be passed along to the

new owner via the contractual indemnity obligations of the purchase and sale agreement. We

recommend that EPA include in the Draft Agreement some language that prohibits EPA from using the

results of the audit to initiate an enforcement action against the prior owner or operator.

IV. EPA Approval Should Not be Required to Transfer the Draft Agreement to a New Owner

If an operator has entered into a Draft Agreement, it has voluntarily decided to identify and

correct violations associated with the acquired assets. This is a voluntary agreement with EPA, not a

consent decree that resolves violations caused by the operator. It is unclear why EPA believes it

requires approval authority before a Draft Agreement may be transferred to a new owner. This will only

add unnecessary uncertainty in the transaction process and provide additional reasons for an operator

not to use the Draft Agreement. Accordingly, we have revised the transfer provisions in the Draft

Agreement to be a notice-only requirement to EPA.

V. Appendix A Definitions - Clarifications and Revisions

Consistent with our statements herein, we recommend all definitions associated with Appendix

B and engineering and design issues be eliminated. Our recommended revisions to Appendix A

definitions are reflected in the red-line of the Draft Agreement that is enclosed as

Attachment A to this

letter.

VI. Appendix B VCS Engineering and Design

For the reasons discussed above, we believe that Appendix B should be eliminated in its

entirety. Furthermore, apart from the engineering and design methodology, EPA also includes certain

field survey and IR camera verification requirements to apparently confirm the engineering and design

analysis. These too should be eliminated entirely from the Draft Agreement, even if EPA provides a

more flexible approach regarding engineering and design methodology. We are concerned that these

extraneous and unnecessary requirements will prove to be a disincentive for new owners and operators

to utilize the Draft Agreement.

a. VCS Field Survey Operating Procedure and Related VCS Field Survey Requirements in

Paragraphs 3 and 4 are Unnecessary

The VCS Field Survey Standard Operating Procedure ("SOP"), VCS Field Survey, and related

requirements in paragraphs 3 and 4 are unnecessary and of limited utility in confirming VCS design.

Certification that a VCS is adequately sized and properly functioning is sufficient to demonstrate that the

necessary corrective action was completed. Further, because both field survey requirements are

maintenance related, rather than design related, requiring a field survey conducted pursuant to a SOP is

extraneous to correcting any engineering and design issues identified during the engineering analysis

and as such unnecessarily complicates the audit process. The audit process is intended to encourage

self-disclosure and voluntary correction of violations. Requiring significant actions beyond what is

required to identify and correct violations (or actions that may not even be required by a state's SIP),

such as an SOP and related field survey requirements, will have a chilling effect on the stated goal of the

audit process because operators will be less willing to participate.

b. The Vapor Control System Verification Requirement in Paragraph 5.B. is Unnecessary

The Vapor Control System Verification requirement in paragraph 5 is also unnecessary. As

discussed above, certification that a VCS is adequately sized is sufficient to demonstrate that the

necessary corrective action was completed. Indeed, a one-time IR camera verification does not actually

provide confirmation that a VCS is adequately or inadequately designed. For example, VOC emissions

observed during an IR camera inspection may simply result from a leak and as such do not indicate

inadequate design. Furthermore, there are a number of logistical difficulties with timing an IR camera

inspection during a dump cycle, particularly for small producing wells that may, at best, cycle once per

day. Again, if other technologies or methodologies are utilized that do not measure the PPIVFR, this

requirement would be impossible to comply with. Again, EPA should not prescribe how a person would

assess the VCS in order to get the benefit of this Draft Agreement.

Additionally, the apparent requirement to replace "Compromised Equipment"-a term that,

again, has no basis in regulation-is unrelated to issues discoverable as part of an engineering and

design analysis. This is, at its core, a maintenance issue that has no relation to inadequate VCS design.

As such, it is not a corrective action and is beyond the scope of an audit.

VII. Appendix C Reporting and Recordkeeping - Clarifications and Revisions

We recommend the following revisions and clarifications to Appendix C. Our recommended

revisions to Appendix C are reflected in the red-line of the Draft Agreement that is enclosed as

Attachment A to this letter.

a. Paragraph 1 Should be Eliminated

It is unclear what is meant by "Audit protocols" and "Audit Checklists" in paragraph 1 of

Appendix C. Presumably, such a requirement envisions that an operator will prepare written protocols

and procedures regarding how it will conduct the audit, apparently for EPA's approval. In our

experience, the vast majority of oil and gas operators routinely conduct internal audits for a variety of

reasons and under various regulatory programs. Indeed, these companies have robust, sophisticated

internal processes for conducting audits and, in some cases, hire experienced outside consultants to

conduct the audit. Requiring EPA approval of the operator's audit protocols and procedures is

unnecessary and needlessly injects an area for potential disagreement into the process. We request

that paragraph 1 be eliminated.

b. Proposed Revisions to Paragraph 3

Paragraph 3 should be revised to clarify that an operator does not need to continue to submit

Semi-Annual Reports once the Final Report has been submitted. Requiring Semi-Annual

Reports after

submission of the Final Report would be superfluous and should not be necessary while an operator

waits for EPA to issue its Notice of Determination.

Additionally, the requirement to identify the costs of returning to compliance in paragraph

3.B.ii. is not relevant or necessary. To obtain coverage under EPA's current audit programs, operators

must complete and certify that all necessary corrective actions have been completed. We fail to see

how the cost of such corrective actions is relevant to this process, and we are not aware of any

requirement in EPA's audit programs that requires cost information be disclosed. To the extent EPA is

requesting this information to calculate subsequent civil penalties based on economic benefit of the

violations, such a requirement will only deter the use of the Draft Agreement.

For the same reasons, paragraph 3.B.iii.'s requirement to identify pollutant reductions is not

relevant, necessary, or feasible in some cases. Determining the amount of pollutant reductions is

immaterial to whether or not an operator took sufficient corrective action and therefore, such

reductions are irrelevant to the purposes of an audit. Moreover, accurately quantifying the reductions

for certain corrective action is often not feasible because new owners often will not have the historical

emissions information on which to base an emissions reduction calculation. Furthermore, forcing

operators to disclose the magnitude of a violation could create a variety of issues (especially for public

companies) and will have a chilling effect on use of the Draft Agreement.

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VIII. Conclusion

Again, we appreciate EPA's willingness to work with the oil and gas industry in developing this

new Draft Agreement. Thank you for considering WVONGA's views on the new Draft Agreement.

WVONGA urges the EPA to approve the new Draft Agreement, in order to better facilitate vitally-needed

energy exploration and production facilities.

Respectfully submitted,

/s/ Anne C. Blankenship

Executive Director

West Virginia Oil & Natural

Gas Association

P.O. Box 3231

Charleston, WV 25332

(304) 343-1609